

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 13-383 PJH

v.

PRETRIAL ORDER

FRANK ANTHONY MORTON,

Defendant.

This matter came before the court for a pretrial conference on September 24, 2014. At the pretrial conference, the court ruled on several motions and other pretrial issues as stated on the record and summarized below. The court further ORDERS as follows:

I. Government's Motions in Limine

The government's unopposed motions in limine (1) to admit the expert testimony of DEA Special Agent Jim Bush and DEA Forensic Chemist Charmaine Qui on the topics specified in the motion; (2) to exclude references to potential sentences, fines or penalties; (3) to exclude irrelevant references to defendant's background and family situation; and (4) to prohibit reference in opening statements to facts that are not reasonably anticipated to be introduced at trial, are GRANTED as stated on the record.

The government's motion in limine no. 5, to exclude reference to the DOJ's new electronic recording policy for statements made by individuals in federal custody, effective July 2014, is DENIED. Pursuant to FRE 401, the evidence of the DOJ's current policy is relevant to defendant's argument that electronic recording is a more reliable method of memorializing an interview than note taking. The court determines that evidence of the DOJ policy should not be excluded pursuant to FRE 403 because its highly probative value

1 is not substantially outweighed by the danger of unfair prejudice to the government,
2 confusion of the issues, misleading of the jury, or waste of time. Furthermore, FRE 407 is
3 not implicated here because defense counsel represent that they do not seek to introduce
4 evidence of the DOJ policy to show negligence or culpability of the agents who interviewed
5 defendant before the policy was implemented, but to demonstrate that electronic recording
6 is considered reliable and recognized as a “best practice.”

7 **II. Coconspirator Statements**

8 As stated on the record, defendant has withdrawn his objections to the admissibility
9 of the coconspirator statements proffered by the government. The court determines that
10 the government has sufficiently established the conditional admissibility of the
11 coconspirator statements pursuant to FRE 801(d)(2)(E), subject to the evidence to be
12 presented at trial. See *United States v. Larson*, 460 F.3d 1200, 1212 (9th Cir. 2006) (citing
13 *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)), *adopted in relevant part on reh'g en*
14 *banc*, 495 F.3d 1094, 1096 n.4 (9th Cir. 2007).

15 **III. Jury Instructions and Verdict Form**

16 As ordered at the hearing, the parties shall submit, by the first day of trial, a revised
17 verdict form and a final set of jury instructions that includes Ninth Circuit Model Criminal
18 Jury Instructions 7.1 through 7.6, as well as the instructions on use of electronic
19 technology, which are attached as Appendix A.

20 The court defers ruling on the government’s proposed instruction on deliberate
21 ignorance, based on Ninth Circuit Model Criminal Jury Instruction 5.7, until the evidence is
22 presented at trial. The court denies defendant’s request to instruct the jury with state court
23 model instructions on sufficiency of circumstantial evidence and evidence of a defendant’s
24 statements, as stated on the record.

25 **IV. Juror Questionnaire**

26 The court adopts in part the questions proposed by the parties, as incorporated in
27 the attached juror questionnaire, Appendix B. As stated on the record, defendant withdrew
28 his proposed question concerning the race, ethnicity and national origin of the defendant,

1 attorneys and witnesses. The court declines to include questions proposed by the
2 government that are cumulative or repetitive of the questions currently included in the
3 questionnaire. The parties shall meet and confer to propose modification to Question 22
4 regarding tendency to believe or disbelieve law enforcement witnesses.

5 **IT IS SO ORDERED.**

6
7 Dated: September 25, 2014

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9 _____
10 PHYLLIS J. HAMILTON
11 United States District Judge
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APPENDIX A**USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR
COMMUNICATE ABOUT A CASE****Before Trial:**

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

I hope that for all of you this case is interesting and noteworthy.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on

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information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

APPENDIX B

CONFIDENTIAL JUROR QUESTIONNAIRE

Please fill out this form as completely as possible and print clearly. Since we want to make copies for the attorneys and the court, do not write on the back of any page. If you need more room, continue at the bottom of the page. If there is anything on this form that you do not want to talk about in open court, please write "Private" beside the question number. Thank you for your cooperation.

1. Your name: _____

2. Your age: _____

3. The city where you live: _____

4. Your place of birth: _____

5. Do you rent or own your home? (circle one) rent own

6. Your marital status: (circle one)

single married separated divorced widowed live with partner

7. What is your occupation, and how long have you worked in it? (If you are retired, please write "retired" and describe your main occupation when you were working.)

8. Who is (or was) your employer?

9. How long have you worked (or did work) for this employer? _____

10. Please list the occupation of your spouse or partner.

11. If you have children, please list their age and gender and, if they are employed, please give their occupations.

12. Your educational background:

Highest grade completed: _____

College and/or vocational schools you have attended:

1 Major areas of study: _____

2 13. Have you ever served on a jury?

3 ____ Yes ____ No

4 If yes, how many times in:

5 State/County Court _____ Federal Court _____

6 When _____

7 Civil or criminal case(s) _____

8 Did the jury(ies) reach a verdict? _____

9 Is there any reason that your prior jury service would affect your ability to be fair,
10 objective, and impartial to both sides at this trial?

11 ____ Yes ____ No

12 14. Have you, or a close friend or family member, ever worked for a court or for any
13 prosecution or criminal defense office, including a district attorney's office, United States
Attorney's Office, public defender's office, or a private criminal defense attorney's office?

14 ____ Yes ____ No

15 15. Have you, or a close friend or family member, ever been employed by any law
enforcement agency?

16 ____ Yes ____ No

17 16. Have you ever served in the military police or participated in a court martial?

18 ____ Yes ____ No

19 17. Have you, or a close friend or family member, been the victim of or witness to a
20 crime?

21 ____ Yes ____ No

22 If yes, please explain:

23 _____

24 _____

25 _____

26 18. Have you, or a close friend or family member, ever been accused, arrested or
27 convicted of any offense?

28 ____ Yes ____ No

1 If yes, please explain:

2 _____
3 _____
4 _____

5 19. Have you, or a close friend or family member, ever had a negative experience with a
6 federal or state law enforcement officer or agency?

7 ____ Yes ____ No

8 If yes, please explain:

9 _____
10 _____
11 _____

12 20. Have you, or have any close relatives or friends, had any contact with the United
13 States Drug Enforcement Administration (DEA)?

14 ____ Yes ____ No

15 a. If yes, what was the nature of the contact?

16 _____
17 _____
18 _____

19 b. Do you feel that you or your family member or friend was treated fairly by the
20 DEA agents or employees?

21 ____ Yes ____ No

22 21. You will hear testimony in this case from agents of the Drug Enforcement
23 Administration. Is there anything you may have experienced, seen, heard, or read about
24 that would prevent you from fairly assessing the credibility of the witnesses from that
25 agency?

26 ____ Yes ____ No

27 If yes, please explain:

28 _____

22. Would you consider the testimony of a law enforcement witness to be less or more credible than the testimony of any other witness because of his/her occupation in law enforcement?

☐ Less credible ☐ More credible ☐ No different

If your answer is less credible or more credible, please explain:

23. In this case, the defendant is charged with conspiracy to distribute and possess with intent to distribute cocaine, as well as possession with intent to distribute cocaine. Is there anything about the nature of these charges that would make it difficult for you to be a fair and impartial juror?

☐ Yes ☐ No

If yes, please explain:

24. In this case, the defendant is charged with violations of federal law concerning conspiracy and possessing with intent to distribute cocaine. If you are selected as a juror in this case, it will be your duty to apply federal law to the facts of this case. Do you have any disagreement with federal narcotics laws?

☐ Yes ☐ No

a. If yes, please identify which laws and explain why you disagree with them:

b. Do those feelings or opinions apply to all types of narcotics, or just certain narcotics?

1 c. Do you believe that any of those feelings or opinions will prevent you from
2 being a fair and impartial juror in this case?

3 ☐ Yes ☐ No

4 25. Do you belong to, or support, any group which advocates the legalization of any type
5 of drug?

6 ☐ Yes ☐ No

7 26. Do you understand that a defendant in a criminal case is presumed to be innocent
8 unless proven guilty and that the burden of proof is upon the government to prove guilt
9 beyond a reasonable doubt before there can be a conviction?

10 ☐ Yes ☐ No

11 27. Will you be able to presume the defendant in this case to be innocent ?

12 ☐ Yes ☐ No

13 28. Because the defendant is presumed innocent and the burden of proof is on the
14 government to prove guilt beyond a reasonable doubt, the defendant need not testify, or
15 present any witnesses or evidence. In fact, the defendant has a constitutional right not to
16 testify and to rely upon the presumption of innocence. Will you be able to presume the
17 defendant to be innocent if he chooses not to testify or not to present any witnesses or
18 evidence?

19 ☐ Yes ☐ No

20 29. If, at the end of the case, you believe that the defendant is guilty beyond a
21 reasonable doubt, will you be able to return a verdict of guilty?

22 ☐ Yes ☐ No

23 30. If, at the end of the case, you have a reasonable doubt as to the defendant's guilt,
24 will you be able to return a verdict of not guilty?

25 ☐ Yes ☐ No

26 31. Will you be able to follow the law as the court gives it to you, even if you disagree
27 with it or think it should be different?

28 ☐ Yes ☐ No

32. Do you practice a religion that has a doctrine that its members may not sit in
judgment of another's conduct in a court of law in a criminal case?

☐ Yes ☐ No

33. Is there any other reason, not addressed above, that would make it difficult for you
to be a fair and impartial juror in this case?

☐ Yes ☐ No

If yes, please explain:

VERIFICATION

I, _____, declare under penalty of perjury
PRINT FULL NAME

under the laws of the State of California and the United States of America, that the foregoing responses I have given on this juror questionnaire, and on any attached sheets, are true and correct to the best of my knowledge and belief.

DATE

SIGNATURE